BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAJEANA M. GOODNIGHT Claimant VS. **PRODUCT MANUFACTURING CORP.** Respondent AND **ONEBEACON AMERICAN INS. CO.** Insurance Carrier	)	Docket No. **1,046,153**

ORDER

Claimant requests review of the December 10, 2010 Award by Special Administrative Law Judge Jerry Shelor. The Board heard oral argument on March 18, 2011.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared for the claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

While at work the claimant lifted her supervisor in an attempt to pop her supervisor's back. The claimant's knee gave out and the two fell to the floor. Claimant suffered injury and argued the incident was compensable. Respondent denied the claim and argued the accident did not arise out of her employment. The Special Administrative Law Judge (SALJ) found claimant failed to sustain her burden of proof that her accidental injury arose out of her employment with respondent.

Claimant requests review of whether she met with personal injury by accident on December 3, 2008, which arose out of and in the course of her employment; and, if so, the case should be remanded back to the administrative law judge for determination of the remaining issues including but not limited to the nature and extent of disability.

Claimant argues that the act of lifting her supervisor to alleviate her discomfort and to pop her back was not horseplay. In the alternative, claimant argues the employer was aware of this type of conduct at the workplace and therefore the case should still be deemed compensable.

Respondent argues that the events that took place on the date of accident did not have any relationship to the nature, conditions, obligations or incidents of employment. Consequently, respondent argues the SALJ's Award should be affirmed.

The sole issue for Board determination is whether claimant met her burden of proof to establish that she suffered accidental injury arising out of her employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On December 3, 2008, while at work in respondent's shipping office, claimant's supervisor, Sonja Long, mentioned that her back was hurting. Ms. Long and a co-worker of claimant's named Leah Two-Hatchett testified that when Ms. Long mentioned her back pain, claimant volunteered to pop her back. At first Ms. Long resisted and it was only after about 15 minutes of bantering that Ms. Long finally relented and allowed claimant to try to pop her back. It was while claimant was attempting to lift Ms. Long to pop her back that they both fell and claimant suffered an injury to her knee.

Claimant provided a different version of the events leading up to the lifting incident and the fall. Claimant alleges that Ms. Long ordered her to stand behind Ms. Long and lift her off her feet, in order to pop her back. But both Ms. Long and claimant's co-worker, Ms. Two-Hatchett, refuted this claim, testifying that it was claimant who persisted in offering to pop Ms. Long's back. And Ms. Long initially refused but as claimant persisted she eventually relented after about 15 minutes of discussion. The testimony of Ms. Two-Hatchett corroborated Ms. Long's version of events leading up to the accident and is persuasive. The Board affirms the SALJ's finding that claimant not only was a willing participant but also instigated the activity.

Claimant testified that before December 3, 2008, other employees had popped Ms. Long's back weekly. Although they did not testify at the preliminary hearing in this matter, two co-workers and friends of claimant were later deposed. Douglas Elliott worked as a

receiving clerk for respondent. Mr. Elliott testified that Zane Hudson would often pop Sonya's back in the receiving area and that he was aware that Mr. Hudson had helped Ms. Long pop her back a handful of times. Mr. Elliott also testified that he had observed Mr. Hudson pop Ms. Long's back during a social gathering at a bar. He further testified that Ms. Long had asked him to do it as well but he didn't feel comfortable doing it. Kaycee Elliott, Mr. Elliott's wife, also testified she witnessed Ms. Long's back being popped five or six times before the time of claimant's knee injury. Both Mr. and Mrs. Elliott had been laid off work at respondent before they testified.

Ms. Long denied ever having her back popped at work in the shipping office before December 3, 2008. Ms. Long agreed a co-worker, Zane Hudson, had popped her back on one or two occasions out in the parking lot while on break. But Ms. Long was adamant this activity only occurred in the parking lot and never in respondent's shipping office. Mr. Hudson agreed that he had popped Ms. Long's back on a couple of occasions in the parking lot. Ms. Two-Hatchett testified that she had worked for respondent for three years and was unaware of and had not seen any other employee lift Ms. Long to pop her back. Claimant also alleged that an employee named James Pete Bradley had popped Ms. Long's back, but both Ms. Long and Mr. Bradley deny that this ever occurred.

After the testimony was received from Mr. and Mrs. Elliott additional testimony was received from Ms. Long and Mr. Hudson. Mr. Hudson testified that he did not pop Ms. Long's back while in the receiving area.

> Q. Okay. You've previously testified at the preliminary hearing that you popped Sonya's back on two occasions while outside in the parking lot area on break. Is that the only two instances that you popped Sonya's back?
>
> A. Yes.
>
> Q. Did you ever pop Sonya's back away from the workplace such as at a place where co-workers would socialize, a bar or other place like that?
>
> A. No.[1]

Ms. Long testified:

> Q. Okay. Doug Elliott has testified that on anywhere from six to ten occasions he witnessed Zane Hudson pop your back down in the receiving area where he was working. Did that happen?
>
> A. No.

[1] Hudson Depo. at 6-7.

> Q. Did Zane ever pop your back anywhere inside the facility at Product Manufacturing?
>
> A. No.
>
> Q. The testimony at the time of the preliminary hearing indicated that Zane popped your back on two occasions outside in the parking lot. Was that the only two times that he popped your back?
>
> A. Yes.[2]

Ms. Long also denied that she had asked Mr. Elliott to pop her back in the receiving department area.

It is undisputed that claimant suffered an accidental injury which occurred in the course of her employment with respondent. However, whether the injury arose out of the employment is contested. The burden to show that an injury arose out of the employment is on the claimant.[3]

Arising "out of" the employment is defined as follows:

> An injury arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment.[4]

The Kansas Supreme Court has held that, for an accident to arise out of the employment, some causal connection must exist between the accidental injury and the employment.[5]

It should be noted that claimant in her brief to the Board as well as at oral argument agreed that claimant's activity lifting her supervisor to pop her back was not a work activity. An Accidental Injury Claim Form submitted to her husband's insurance carrier stated that the injury occurred while "horse playing". Claimant also applied for short-term disability

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[2] Long Depo. at 6.

[3] *Jones v. Lozier-Broderick & Gordon*, 160 Kan. 191, 160 P.2d 932 (1945).

[4] *Newman v. Bennett,* 212 Kan. 562, 512 P.2d 497 (1973).

[5] *Siebert v. Hoch*, 199 Kan. 299, 428 P.2d 825 (1967).

compensation through respondent. The short-term disability form states that claimant was injured "while horse playing".[6]

Injury caused by horseplay does not normally arise out of employment and is not compensable. But if it is shown that the horseplay has become a regular incident of the employment and is known to the employer then injuries suffered in such activities are compensable.[7]

Claimant alleges that the action of popping the back of claimant's supervisor had become a regular incident of the employment. However, the supervisor, Ms. Long, denied ever having her back popped in respondent's shipping office before December 3, 2008. And claimant agreed that she had never attempted to lift Ms. Long to pop her back before the incident on December 3, 2008.

One employee did pop Ms. Long's back on one or two occasions in the parking lot, but those were the only times the back popping occurred. Two friends and former co-workers of claimant testified that Ms. Long's back had been popped by Mr. Hudson and Mr. Bradley from six to ten times at work. But they were unable to specifically establish when those events had occurred. And although Ms. Long and Ms. Elliott had once been roommates, Ms. Elliott testified that they were no longer friends. Conversely, Ms. Long and Mr. Hudson denied the incidents occurred with the frequency alleged by claimant and her friends. And Ms. Two-Hatchett had never heard of any such incidents. The Board finds the testimony of Ms. Long, Ms. Two-Hatchett, Mr. Hudson and Mr. Bradley more persuasive and concludes such activity was not a regular habit at the workplace.

As previously noted the law in Kansas supports compensability when the employer is aware of the activity, or where it has "become a habit at the workplace–in essence, placing the employer on constructive notice of its practice and destructive potential."[8] Here, the more persuasive testimony establishes that Ms. Long had her back popped on a few occasions while on break outside the building in the parking lot. The evidence in this matter indicates that claimant was the instigator and a willing participant in a foolish act unrelated to the incidents of employment. Consequently, the Board finds claimant has failed to meet her burden of proof to establish that she suffered accidental injury arising out of her employment.

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[6] P.H. Trans.at 32-33.

[7] See *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966), and *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 P. 372 (1919).

[8] *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 130 P.3d 111 (2006).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[9] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated December 10, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Jerry Shelor, Special Administrative Law Judge

[9] K.S.A. 2010 Supp. 44-555c(k).